1992

Pat Christine Savage v. Educator's Insurance Company, a Utah Corporation : Brief of Appellee

Utah Court of Appeals

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John Preston Creer; Attorney for Plaintiff/Appellant.

IN THE UTAH COURT OF APPEALS

PAT CHRISTINE SAVAGE Plaintiff/Appellant, vs. EDUCATORS INSURANCE COMPANY, a Utah Corporation, Defendant/Appellee.	Civil No. 920769-CA Classification ~~16~~ 15

BRIEF OF DEFENDANT/APPELLEE

APPEAL FROM A FINAL ORDER IN JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY,
STATE OF UTAH
Hon. Leslie A. Lewis
[Classification 16]

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STATEMENT OF JURISDICTION

This is an appeal from an order dismissing the Plaintiff/Appellant's First Amended Complaint in the Third Judicial District Court of Salt Lake County, State of Utah by the Honorable Leslie A. Lewis.

This Court has jurisdiction of Plaintiff/Appellant's appeal pursuant to Utah Code Ann. § 78-2a-3(2)(k).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Is an employee prevented from bringing an action against the employer's worker's compensation insurance carrier for lack of good faith and fair dealing?

Standard of Review: Correction of Error. State Tax Comm. v. Industrial Comm., 685 P.2d 1051 (Utah 1984).

2. May the District Court, in granting a motion to dismiss, state that all of the material allegations of the Complaint were considered true, rather than recite each allegation of the complaint in the court's order of dismissal.

Standard of Review: Correction of Error. State Tax Commission v. Industrial Commission of Utah, 685 P.2d 1051 (Utah 1984).

DETERMINATIVE STATUTES AND RULES

The following statutes and administrative rules are referred to herein and are set out verbatim in the Addendum.

Utah Code Admin. § 31A-22-1003
Utah Code Admin. § 31A-22-1004
Utah Code Admin. § 31A 22-1008
Utah Code Admin. §§ 41-12a-301 to 303
Utah Code Admin. § 41-12a-102(9)
Utah Code Admin. § 78-2a-3(2)(k)
Utah Admin. R. R 568-1-3E

STATEMENT OF THE CASE

Plaintiff/Appellant Christine Savage ("Ms. Savage") filed a complaint against Defendant/Appellee Educators Insurance Company ("Educators") alleging, *inter alia*, bad faith adjusting of Ms. Savage's worker's compensation claim. (R. 2-11). Upon Educators' Motion to Dismiss, (R. 16-30), Ms. Savage filed her First Amended Complaint alleging breach of contract, breach of covenant of good faith and fair dealing, intentional infliction of severe emotional distress, tortious or bad faith conduct, breach of fiduciary relationship, and interference with a protected property interest. (R. 54-65).

Educators renewed its Motion to Dismiss as to the First Amended Complaint. (R. 77-86). The District Court granted Educators' motion (R. 120-123) and issued a final order dismissing the First Amended Complaint in its entirety, with prejudice. (R. 131-143). Ms. Savage appealed to the Utah Supreme Court, which assigned the case to this Court.

STATEMENT OF FACTS

Educators provides Jordan School District's worker's compensation insurance.[1] (R.55). Ms. Savage was an employee of Jordan School District on January 5, 1987, when she was injured in an accident arising out of and in the course of her employment. (R.55).

Three physicians recommended that Ms. Savage undergo dorsal column stimulator treatment. (R.55). Educators referred Ms. Savage to Dr. Gerald Moress for an independent medical examination (hereinafter "IME"). (R.55). Dr. Moress indicated in his IME report that he knew of no further treatment for Ms. Savage and that it was not likely that a dorsal column stimulator treatment would relieve Ms. Savage's pain. (R.55-56).

Based on the recommendation of Dr. Moress, Educators informed Ms. Savage that further medical treatment would not be covered by worker's compensation insurance, with the exception of continued coverage for psychiatric treatment. (R.56).

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[1]Because this appeal arises from a motion to dismiss, the allegation in Ms. Savage's Amended Complaint that Educators provides worker's compensation insurance for Jordan School District is accepted as true. However, in reality Jordan School District is self-insured and has contracted with Educators to administer and adjust the District's worker's compensation claims.

Later, in settlement of Ms. Savage's worker's compensation claim, Educators, Ms. Savage, and the Employers' Reinsurance Fund entered a Stipulated Findings and Order. As part of that settlement, Educators agreed to pay for Ms. Savage's disputed medical expenses. (R.56).

SUMMARY OF THE ARGUMENT

Ms. Savage raises several issues in her brief, but discusses only two. Those are (1) whether an employee may bring a cause of action for bad faith against the employer's worker's compensation insurance carrier, and (2) whether the District Court must recite all allegations of the complaint in granting a motion to dismiss. No other issue is supported in her argument, and therefore the additional issues should not be considered on appeal.

Ms. Savage may not bring an action for bad faith against Educators because she is not a party to the worker's compensation insurance contract. That contract is between Educators and the employer, Jordan School District. This court has already determined that a third party claimant may not bring a bad faith action against an insurer. Pixton v. State Farm Mut. Auto Ins. Co., 809 P.2d 746 (Utah App. 1991). The Pixton holding was based on the Utah Supreme Court's holding in Beck v. Farmer's Ins. Exch., 701 P.2d 795 (Utah 1985). The Beck court held that an action for bad faith against an insurer is based in contract, not

in tort. Pixton held that because a third party claimant is not a party to the insurance contract, no bad faith action is possible. Ms. Savage is a third party claimant, and therefore may not bring a bad faith action against Educators.

Ms. Savage claims that workers compensation insurance is unique because it is required by statute. However, other insurance, such as automobile liability insurance, is also required by statute. This fact did not alter the Pixton court's decision to deny a cause of action for bad faith, where the plaintiff had named as a defendant the liability insurer of the driver who caused the plaintiff's injuries.

Ms. Savage asserts that Utah Code Ann. § 31A-22-1004 provides a statutory right for employees to bring a bad faith action against worker's compensation insurers. To the contrary, that section does not create any new cause of action. It merely provides that worker's compensation insurance contracts shall allow an employee to seek worker's compensation benefits directly from the insurer. The statute does not create or consider any other causes of action.

Ms. Savage claims that the District Court failed to consider all material allegations of her Amended Complaint in granting Educator's motion to dismiss. In reality, the District Court specifically stated that all material allegations of a complaint are considered. These specific allegations of the Amended

Complaint which Ms. Savage claims were not considered were in fact referred to individually by the District Court in its written decision. Moreover, the District Court carefully reviewed each cause of action raised in the Amended Complaint in its Conclusions of Law. There is no doubt that the District Court considered all of the material allegations of the Amended Complaint as true. Accordingly, the judgment of the District Court should be affirmed.

ARGUMENT

Ms. Savage's brief identifies several issues presented, but discusses only two of them. First, she asserts that an injured employee who receives worker's compensation benefits should be entitled to bring an action for bad faith against the employer's worker's compensation insurer. Second, Ms. Savage claims that the District Court did not consider all of the allegations raised in her First Amended Complaint when the court granted Educators' Motion to Dismiss. For the reasons stated below, Ms. Savage's arguments are without merit, and the District Court's Order of Dismissal should be affirmed.

POINT I: MS. SAVAGE MAY NOT RELY ON ISSUES NOT SUPPORTED IN HER BRIEF

In her brief Ms. Savage has augmented the issues which she claims must be determined to resolve this matter. In her Docketing Statement, dated September 30, 1992, Ms. Savage stated at page 5 that the issues presented in her appeal were (1) whether an injured worker receiving worker's compensation benefits could bring "a bad faith claim against the employer's worker's compensation insurance carrier," and (2) whether the District Court erred in not repeating each allegation of the Complaint in granting the Motion to Dismiss. Ms. Savage did not identify any other issues in her docketing statement or notice of appeal. However, in her brief, Ms. Savage claims three additional issues which she did not raise before. Briefly, these issues involve whether an employee can bring an action against the employer's worker's compensation insurance carrier for (1) intentional infliction of emotional distress, (2) punitive damages, and (3) breach of a fiduciary relationship between the employee and the insurer. Because these issues were not identified in the docketing statement, they may not be raised in the brief. Moreover, while Ms. Savage raises these additional issues, she fails to support them in the body of her brief. Therefore, this Court should not consider them. State v. Wareham, 772 P.2d 960 (Utah 1989); State v. Reiners, 803 P.2d

1300 (Utah App. 1990); Christensen v. Munns, 812 P.2d 869 (Utah App. 1991).

POINT II: AN EMPLOYEE MAY NOT BRING AN ACTION FOR BAD FAITH AGAINST THE EMPLOYER'S WORKER'S COMPENSATION INSURER

Ms. Savage may not bring an action for bad faith against Educators. She is a third party whose injury entitled her to make a claim on Jordan School District's worker's compensation insurance with Educators. The contract of insurance is between Jordan School District (the "District") and Educators. According to the allegations of the First Amended Complaint, the District is the insured and Educators is the insurer. Ms. Savage is not a party to the insurance contract. In other words, Ms. Savage is a third party making a claim against an insured, the District. That an employer is the insured under a worker's compensation policy is made clear by Utah Code Ann. § 31A-22-1008, which refers twice to the employer as "the insured employer." See full text of statute at Addendum, p. A15. Ms. Savage now alleges that she has an action for bad faith against the insurer, Educators. This issue has already been addressed by the Court of Appeals in Pixton v. State Farm Mut. Auto Ins. Co., 809 P.2d 746 (Utah App. 1991), where this Court's ruling was based on the Utah Supreme Court's prior holdings in bad faith insurance claims. This Court

made it clear that a third party may not bring an action for bad faith against the insurer.

In Pixton, this Court addressed the specific issue of whether a third party recipient of benefits from an insurance policy may bring an action against the insurer for breach of a duty to deal fairly and in good faith. The Court turned to the Utah Supreme Court's decisions and found that a third party beneficiary may not bring an action against an insurer for bad faith or wrongful denial of benefits.

In Pixton, this Court reviewed the Supreme Court's holding in Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1985). In Beck, the insured filed an action for bad faith against the insurer based on a refusal to settle the insured's first party claim for uninsured motorist benefits. The Beck decision determined that there is an implied duty of good faith and fair dealing between an insurer and its insured. The duty was not based in tort, but on the insurance contract between the insured and the insurer. The Court in Pixton relied on Beck for the rule that even in third party situations, the good faith duty requires a contractual relationship:

> The [Beck] court reasoned that such performances were what the insured had "bargained and paid for, and the insurer has the obligation to perform them," or be liable for damages sustained as a result of the breach. Beck, 701 P.2d at 801. The Supreme Court emphasized that the duty to settle claims in good faith is tied to the insurance

> contract and runs to the insured. See id. at 799-800. Although faced with a first-party situation, the court in Beck also emphasized that, even in third-party situations, "the contract itself creates a fiduciary relationship because of the trust and reliance placed in the insurer by the insured." Id. at 799.

Pixton, 809 P.2d at 748.

This Court concluded that the Utah Supreme Court's prior decisions in the area of insurer liability indicated that there was no cause of action for bad faith or wrongful denial of benefits by a beneficiary against an insurer. Further, the Court noted this was the rule followed by the great majority of jurisdictions:

> In sum, we are persuaded that there is no duty of good faith and fair dealing imposed upon an insurer running to a third party claimant, such as Pixton, seeking to recover against the company's insured. This conclusion is consistent with the commentators and the great majority of courts in other jurisdictions that have been confronted with the issue. As one well-known commentator on insurance has noted, "the duty to exercise due care or good faith is owed to the insured and not to a third party." 14 G. Couch, Couch on Insurance § 51:136 (rev. 2d ed. 1982).
>
> The majority of courts faced with the potential existence of a duty of good faith and fair dealing running from an insurance company to a third party claimant seeking to recover against the company's insured have rejected such a notion.

Pixton, 809 P.2d at 749-750.

Ms. Savage quotes the Beck decision in an attempt to argue that worker's compensation claimants should be able to bring

actions in tort against the insurer. However, Ms. Savage is misapplying the Beck holding. Beck held that the duties of an insurer to its insured in a first party situation are contractual. Beck also allowed that outrageous conduct by an insurer towards its insured may give rise to an action in tort in a third party situation. However, the duty in tort law which the Beck court addressed extended only to the insured, not to the third party. As stated, that issue was addressed by the Court of Appeals in Pixton, which held that the third party may not bring an action for bad faith against an insurer.

The Supreme Court also refused to allow a third party to bring an action against an insurer for bad faith in Ammerman v. Farmers Ins. Exch., 19 Utah 2d 251, 430 P.2d 576 (1967). The court in Ammerman indicated that the duty of good faith and fair dealing arises "because of the policy," and is "regarded as a separate cause of action for a wrong done to the insured by violating a fiduciary duty owed to him." Id., at 578 (emphasis added.) The Pixton court determined by following Ammerman that there can be no bad faith action by a third party against an insurer because there is no contractual relationship between them. The insurer's duty of good faith and fair dealing extends only to the insured, with whom it entered the contract. Pixton, 809 P.2d at 749-780.

Ms. Savage is not a party to the insurance contract between Educators and the District. She is a third party with no contractual relationship to the insurer. Consequently, she cannot bring an action against Educators for bad faith under this Court's holding in Pixton.

Ms. Savage claims that worker's compensation insurance should be an exception to the rule announced by this Court, because it is required by statute. However, other types of insurance are also required by statute, yet do not warrant special exceptions to this Court's rule requiring a contractual relationship for a bad faith action. Automobile owners are required to provide certain minimum liability coverage for the benefit of those injured by their negligence. Utah Code Ann. §§ 41-12a-301 to 303, 41-12a-102(9). Yet that fact did not dissuade this Court's opinion in Pixton, where the plaintiff brought her bad faith action based on the insured's automobile liability policy. Pixton, 809 P.2d at 747. Therefore, it is inconsequential that worker's compensation insurance is required by statute.

This Court has made it clear that an action for bad faith is founded in contract, and that there must be a contractual relationship for a party to bring the action. The fact that the insurance contract in this case is for worker's compensation insurance does not change the fact that Ms. Savage is a third

party. She benefits from the insurance policy only to the extent that any injured person benefits from the liability insurance of a person causing an injury. Consequently, she should not be allowed to pursue an action for bad faith.

Ms. Savage argues in her brief that this Court should allow bad faith actions by worker's compensation claimants because other jurisdictions have done so. She cites three cases in particular, two from Colorado, Scott Wetzel Services, Inc. v. Johnson, 821 P.2d 804 (Colo. 1991) and Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985), and one from Nevada, Falline v. GNLV Corp., 107 Nev. 1004, 823 P.2d 888 (Nev. 1991). However, these cases each find that bad faith actions arise in tort. They do not confront the requirement of this jurisdiction that there be a direct contractual relationship on which to base a bad faith insurance action.[2]

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[2]While Ms. Savage declares that the Nevada court "did not define whether it was in tort or contract," this is not accurate. The court in Falline, supra, stated clearly that bad faith insurance actions are brought in tort in that jurisdiction:

> Consonant with our prior rulings, we hold that an employee who has suffered damage as a result of the negligent or bad faith failure or refusal by a self-insured employer or its administrator/agent, to process and timely pay claims properly asserted under the Nevada Industrial Insurance Act (NRS 616) may pursue a tort action in accordance with the limitations set forth in this opinion.

Falline, 823 P.2d at 893 (emphasis added).

Other than the three cases discussed by Ms. Savage, she presents a string of cases which she alleges have concluded that there is a common law cause of action by an injured worker against the employer's worker's compensation insurance carrier. However, of these cases, six are based in tort rather than in contract,[3] one is based on a statute specifically allowing bad faith actions,[4] and one is not a worker's compensation case -- it involves an insured bringing an action for bad faith against his own insurer.[5] Clearly these cases do not alter the reasoning of this Court in Pixton, supra. Moreover, while some states may allow bad faith actions, many states have denied bad faith actions by employees against their employers' worker's compensation insurers.[6]

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[3]West v. Western Cas. & Sur. Co., 846 F.2d 387 (7th Cir. 1988); Holman v. Liberty Mut. Ins. Co., 712 F.2d 1259 (8th Cir. 1983); Southern Farm Bureau Cas. Ins. v. Holland, 469 So.2d 55 (Miss. 1985); Nabors v. Travelers Ins. Co., 551 So.2d 308 (Ala. 1989); Carpentino v. Transport Ins. Co., 609 F.Supp. 556 (D.Conn. 1985); Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220 (1979). Of note is the fact that Wisconsin's legislature has acted to reverse by statute the Wisconsin Supreme Court's decision in Coleman. See Messner v. Briggs & Stratton Corp., 120 Wis.2d 127, 353 N.W. 2d 363 (Ct. App. 1984).

[4]Jones v. Liberty Mut. Ins. Co., 474 N.W.2d 18 (Minn. App. 1991).

[5]Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978).

[6]See, e.g., Lee v. Lee, 469 So.2d 558 (Ala. 1985); Hixon v. State Compensation Fund, 115 Ariz. 392, 565 P.2d 898 (App. 1977); Caplan v. Fireman's Fund Ins. Co., 175 Cal.App.3d 146, 220

Ms. Savage also relies on Horton v. Gem State Mut., 794 P.2d 847 (Utah App. 1990), alleging that the holding in that case provides that a bad faith claim can be asserted against an insurance carrier. However, the holding of that case is that an appellant, claiming there is a lack of evidence in support of the trial court's findings, must provide an adequate record to allow review of the evidence. The case is not pertinent to the matter at hand.

Finally, Ms. Savage claims that Utah Code Ann. § 31A-22-1004 provides a statutory right of action by employees against worker's compensation insurance carriers. That section states:

> All worker's compensation insurance policies shall contain a provision that employees may enforce, in their own names, the liability of the insurer.

Ms. Savage has misconstrued the effect of this statute. It does not purport to create any additional liability of the insurer. It refers only to the liability of the insurer to provide worker's compensation benefits according to the terms of its policy contract with the insured employer. This is made clear by

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Cal.Rptr. 549 (2 Dist. 1985); Old Republic Ins. Co. v. Whitworth, 442 So.2d 1078 (Fla.App. 1983); Bright v. Nimmo, 253 Ga. 378, 320 S.E.2d 365 (1984); Robertson v. Travelers Ins. Co., 95 Ill.2d 441, 448 N.E.2d 866 (1983); Zurich Ins. Co. v. Mitchell, 712 S.W.2d 340 (Ky. 1986); Physicians & Surgeons Hosp., Inc. v. Leone, 399 So.2d 806 (La.App.), writ denied, 401 So.2d 993 (La. 1981); Hajciar v. Crawford & Co., 142 Mich.App. 632, 369 N.W.2d 860 (1985); Young v. United States Fid. & Guar. Co., 588 S.W.2d 46 (Mo.App. 1979).

the companion section to Section 1004. Utah Code Ann. § 31A-22-1003 sets out the required coverage for worker's compensation policies:

> Every insurance policy covering the liability of an employer under Title 35, Chapter 1, shall cover all types of worker's compensation benefits required to be provided under that chapter . . .

(Emphasis added.) This is the liability which may be enforced by the employee under Section 1004. The section allows for efficient resolution of benefit claims by enabling the employee to name the insurer directly on the employee's application for hearing. The Industrial Commission's application for hearing form specifically requests the identity of the insurer for that purpose. Utah Admin. R. R568-1-3E. See Addendum, p. A22. Thus, this section does not create any right in an employee to bring a civil action for bad faith against an employer's worker's compensation insurer.

It is clear under Utah law that a third party making a claim against an insured's insurance policy may not bring an action for bad faith against the insurer. The third party has no contractual relationship contract with the insurer, and thus no entitlement to bring the action. Ms. Savage is precisely in this position, and therefore may not bring her proposed action against Educators. Accordingly, the order of the District Court should be affirmed.

POINT III: THE DISTRICT COURT CONSIDERED ALL MATERIAL ALLEGATIONS IN GRANTING THE MOTION TO DISMISS

Ms. Savage complains that the District Court did not consider all of the allegations of her First Amended Complaint when it granted Educators' Motion to Dismiss. This is not true. The District Court expressly stated that "in the context of a Motion to Dismiss, the material allegations of the complaint are accepted as true. Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990)." The District Court then summarized the essence of Ms. Savage's allegations rather than repeat them all verbatim. Nothing in the court's decision implied that the court considered only those allegations which were summarized. In fact, the court made it clear that all material allegations were considered. This is equally clear from the court's detailed conclusions of law in which the court carefully considered each cause of action raised by Ms. Savage and accepted all of the allegations as true, finding as a matter of law that Ms. Savage had failed to state a claim.

Ms. Savage identifies certain allegations which she alleges were not considered by the District Court. Many of the allegations which Ms. Savage claims were omitted are legal conclusions, not factual allegations, and therefore should not be considered true. Moreover, each of the "material allegations"

which Ms. Savage claims were omitted by the District Court were in fact specifically included by the District Court in its Findings and Conclusions of Law. (R. 131-136.) Referring to the six single-spaced, indented paragraphs included in Ms. Savage's brief at pages 15-16, the allegations of the first paragraph were cited by the District Court at paragraph 3 of the Findings. (R. 133). The allegations of Ms. Savage's second paragraph are found at paragraph 10 of the Findings. (R. 135). The allegations of Ms. Savage's third paragraph are found at paragraph's 5 and 9 of the Findings. (R. 133, 135). The allegations of Mr. Savage's fourth paragraph are found at paragraphs 3 and 9 of the Findings. (R. 133, 135). The allegations of Ms. Savage's fifth paragraph are found at paragraph 11 of the Findings. (R. 135). Finally, the allegations of Ms. Savage's sixth paragraph are found at paragraph 12 of the Findings. (R. 135-136).

The allegations allegedly omitted by the District Court were, to the contrary, specifically included. The District Court specifically stated that all material allegations of the Amended Complaint were considered true. Moreover, the District Court carefully reviewed each cause of action raised in the Amended Complaint in its Conclusions of Law. There is no doubt that the District Court considered all material allegations of the Amended Complaint as true. Consequently there is no error and no harm to Ms. Savage.

CONCLUSION

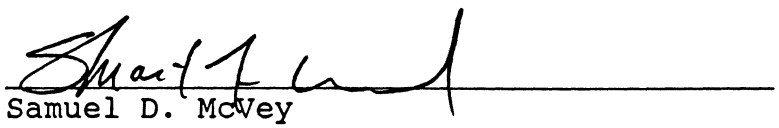
Ms. Savage is not entitled to bring an action for bad faith against Educators because she has no contractual relationship with Educators. She is a third party, not the insured. This issue has already been ruled upon by this Court. In addition, Ms. Savage is simply mistaken when she alleges that the District Court failed to consider all of the material allegations of the First Amended Complaint. The District Court did in fact expressly consider each material allegation. This fact is also evidenced by the detailed examination the District Court gave to each cause of action raised by Ms. Savage.

Accordingly, the judgment of the District Court should be affirmed by this Court.

DATED this 16th day of February, 1993.

Respectfully Submitted,

KIRTON, McCONKIE & POELMAN



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Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I, Stuart F. Weed, certify that on February 16th, 1993 I served four copies of the attached BRIEF OF DEFENDANT/APPELLEE upon John Preston Creer, counsel for the appellant, in this matter by mailing them to him by first class mail with sufficient postage prepaid to the following address:

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ADDENDUM

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

PAT CHRISTINE SAVAGE Plaintiff, vs. EDUCATORS INSURANCE COMPANY, a Utah Corporation, Defendant.	:	**FINDINGS AND CONCLUSIONS OF LAW** Civil No. 920901786 Judge Leslie A. Lewis

This matter comes before the Court on a Motion to Dismiss filed by the defendant. Plaintiff Christine Savage filed the original complaint in this matter, after which defendant Educator's Insurance Company filed a motion to dismiss the complaint. In response, Plaintiff filed her First Amended Complaint, which defendant then included in its motion to dismiss. The First Amended Complaint alleged breach of contract as the first cause of action, breach of covenant of good faith and fair dealing as the second cause of action,

intentional infliction of severe emotional distress as the third cause of action, tortious or bad faith conduct in dealing with plaintiff in the second, third and fourth causes of action, breach of fiduciary relationship in the fifth cause of action, and interference with a protected property interest in the sixth cause of action. Plaintiff also alleged entitlement to punitive damages.

The Court has received the defendant's motion to dismiss and memorandum in support thereof. The Court has also received the plaintiff's memorandum in opposition and defendant's reply to plaintiff's memorandum. The matter was submitted for decision and was argued before the Court on July 17, 1992. Plaintiff was represented by her attorney, John Preston Creer. Defendant was represented by its attorney, Samuel D. McVey. The Court has now reviewed the defendant's motion to dismiss and the memoranda filed by both parties and has carefully considered the arguments of counsel. Being fully advised, the Court makes the following findings and conclusions of law.

FINDINGS

In the context of a motion to dismiss, the material allegations of the complaint are accepted as true. Colman v. Utah State Land Board, 795 P.2d 622 (Utah 1990). The following findings and allegations are taken from the plaintiff's first amended complaint.

1. Plaintiff was employed by Jordan School District when she sustained personal injuries arising out of and in the course of her employment. (First Amended Complaint, ¶¶ 2, 5, and 6.)

2. At the time of plaintiff's injury, defendant was the workers' compensation insurance carrier for Jordan School District. Defendant had entered into a contract with Jordan School District to provide such insurance. (First Amended Complaint, ¶¶ 3, 12.)

3. Plaintiff underwent surgery and treatment for her injuries, but still suffered from extreme lower back pain. Three physicians recommended that she have a dorsal column stimulator treatment. (First Amended Complaint, ¶¶ 6 and 7.)

4. Defendant referred plaintiff to Dr. Gerald Moress for an independent medical evaluation (hereinafter "IME"). Dr. Moress provided a written opinion that he knew of no further medical treatment for the plaintiff's condition. He was also of the opinion that it was not likely that a dorsal column stimulator treatment would relieve the plaintiff's pain. (First Amended Complaint, ¶ 8.)

5. Based on Dr. Moress' opinion, defendant informed plaintiff that no future medical expenses would be covered by workers' compensation insurance, including the dorsal column stimulator. Defendant did continue to provide coverage for psychiatric care. This occurred on March 6, 1991. (First Amended Complaint, ¶ 9.)

6. On or about December 2, 1991, defendant entered into a stipulated findings and order in case No. B91000577 before the Industrial Commission of Utah which was plaintiff's workers' compensation claim arising out of her industrial injury. In the stipulation and order, defendant stipulated that it would pay all of plaintiff's medical

expenses arising out of her industrial injury, including the dorsal column stimulator treatment. (First Amended Complaint, ¶ 10.)

7. The workers' compensation insurance contract between defendant and Jordan School district required defendant to pay all reasonable and necessary medical expenses incurred by plaintiff as the result of accidents or injuries sustained while working for Jordan School District. Plaintiff suffered an industrial accident and defendant refused to pay for certain medical expenses arising out of the accident. Plaintiff alleges that this refusal was a breach of the workers' compensation insurance contract, thus causing damage to the plaintiff. (First Amended Complaint,

¶¶ 14-18.)

8. Plaintiff alleges that defendant breached a duty of good faith and fair dealing in denying plaintiff's request for certain medical benefits under the workers' compensation policy. Plaintiff also alleges that defendant acted wrongfully and unreasonably by failing and refusing to make an adequate investigation prior to withholding approval for the dorsal column stimulator treatment, by refusing to give reasonable interpretation to the provisions of the workers' compensation insurance policy, by acting to protect defendant's own financial interest at the expense of the plaintiff's rights, by failing to provide plaintiff any reasonable or justifiable basis for denying plaintiff's request for a dorsal column stimulator and by forcing plaintiff to engage legal counsel and initiate litigation. Plaintiff also alleges that defendant breached a duty of good faith and fair dealing by failing to

administer plaintiff's claim for workers' compensation benefits in compliance with Utah Code Annotated § 31A-26-303(3)(h). (First Amended Complaint, ¶ 20.)

9. Plaintiff alleges that defendant intentionally inflicted severe emotional distress on the plaintiff by using Dr. Moress' IME report as a basis to terminate plaintiff's workers' compensation benefits. Plaintiff alleges that such reliance on Dr. Moress' report was not sufficient cause for such termination of benefits. (First Amended Complaint, ¶ 25.)

10. Also in support of her claim for intentional infliction of emotional distress, plaintiff alleges that defendant was aware that Dr. Moress would provide a conservative medical opinion and that there was a strong likelihood that his opinion would not be favorable to plaintiff. (First Amended Complaint, ¶ 26.)

11. Plaintiff alleges that defendant engaged in a tortious course of conduct by using Dr. Moress for an IME evaluation, knowing that his opinions favor the insurance company rather than being fair, balanced, medically sound and accurate. (First Amended Complaint, ¶ 33.) Plaintiff alleges that the defendants should have known that the plaintiff and others similarly situated would be damaged through their use of Dr. Moress as an IME physician. (First Amended Complaint, ¶ 34.)

12. Plaintiff alleges a breach of a fiduciary relationship between the defendant and the plaintiff. Plaintiff asserts that the defendant, by issuing the workers' compensation insurance policy to Jordan School District and accepting premiums, agreed and promised that if plaintiff incurred covered medical expenses that the duty of the defendant to pay

such benefits would arise. Plaintiff alleges that once plaintiff and plaintiff's doctor requested a dorsal column stimulator, such request gave rise to a duty to approve the requested treatment and pay the benefits associated therewith. After the duty to pay benefits arose, plaintiff asserts that such benefits were no longer the property of the defendant but were held by the defendant for the sole benefit and use of the plaintiff, thereby creating a fiduciary relationship between defendant and plaintiff. Plaintiff claims that this duty was breached when the medical treatment was not approved. (First Amended Complaint, ¶¶ 39-42.)

13. Plaintiff alleges that defendant knew that plaintiff was relying on the financial assistance from the benefits provided under the workers' compensation insurance policy and that plaintiff had a protected property interest in such benefits. Plaintiff alleges that defendant intentionally and willfully interfered with this protected property interest in denying plaintiff the opportunity to have the dorsal column stimulator treatment. (First Amended Complaint, ¶ 44.)

14. Plaintiff also alleged throughout the complaint that defendant's conduct was willful, malicious, knowing, and reckless, thus entitling plaintiff to punitive damages.

CONCLUSIONS OF LAW

Plaintiff's first cause of action alleges that defendant entered a contract with plaintiff's former employer Jordan School District (the "District") to provide workers' compensation benefits including reasonable and necessary medical expenses arising out of

industrial accidents. Plaintiff alleges that defendant breached that contract by not providing certain medical benefits she requested. The determination of whether medical treatment is reasonable and necessary is one to be made exclusively by the Industrial Commission pursuant to Utah Code Ann. section 35-1-60. This section provides that the workers' compensation remedy is the exclusive remedy for employees injured in the course of their employment.

> The right to recover compensation pursuant to the provisions of this Title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and . . . the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee . . . and no action at law may be maintained against an employer, or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee.

The Workmen's Compensation Act provides specific procedures to follow in the event an employee is dissatisfied with medical benefits provided by the insurance carrier. The proper course is to file an application for hearing with the Industrial Commission or request other Industrial Commission review. It is not proper to seek review of such matters in District Court. Plaintiff has alleged in this cause of action that she was not provided with medical benefits which were reasonable and necessary. That determination must be addressed by the Industrial Commission, and not by this Court. Therefore, the plaintiff's first cause of action for breach of contract is dismissed with prejudice.

Plaintiff's second cause of action alleges that defendant breached a covenant of good faith and fair dealing owed to plaintiff. Plaintiff has also alleged tortious or bad faith conduct in defendant's dealing with plaintiff in her second, third and fourth causes of action. The Utah courts have made it clear that only an insured can bring an action of bad faith or wrongful denial against its insurer. In Pixton v. State Farm, 809 P.2d 746 (Utah App. 1991), the Utah Court of Appeals addressed the specific issue of whether a beneficiary of an insurance policy can bring an action against the insurer for breach of a duty to deal fairly and in good faith. The Court found that the Utah Supreme Court's prior decisions in the area of insurance carrier liability indicated that there was no cause of action for bad faith or wrongful denial of benefits by a beneficiary against an insurer.

> In sum, we a persuaded that there is no duty of good faith and fair dealing imposed upon an insurer running to a third party claimant, such as Pixton, seeking to recover against the company's insured. This conclusion is consistent with the commentators and the great majority of courts in other jurisdictions that have been confronted with the issue. As one well known commentator on insurance law noted, "the duty to exercise due care or good faith is owed to the insured and not to a third party." 14G Couch on Insurance section 51:136 (Rev. 2d Ed. 1982).
>
> The majority of courts faced with the potential existence of a duty of good faith and fair dealing running from an insurance company to a third party claimant seeking to recover against the company's insured have rejected such a notion.

809 P.2d at 749-750.

The Supreme Court of Utah has also indicated that no bad faith action can be brought where there is no privity of contract between the plaintiff and the defendant

insurer. Auerbach Company v. Key Security Policy, Inc., 680 P.2d 740 (Utah 1984). A contract of insurance is between the insurer and the insured, not the insurer and a third party claimant.

Plaintiff has alleged in her amended complaint that she is a beneficiary to a contract of insurance between defendant and Jordan School District. She has alleged that the insurance contract was between defendant and the District. The Plaintiff in this action is a third party, and is not a party to the contract of insurance between defendant and the District. She is therefore not entitled to raise claims of tortious or bad faith conduct, or breach of covenant of good faith and fair dealing. Therefore, the second, third and fourth causes of action are dismissed with prejudice.

Plaintiff's third cause of action alleges intentional infliction of severe emotional distress because the defendant terminated medical benefits based on an independent medical examination report of Dr. Gerald Moress. Plaintiff alleges that defendant sent plaintiff to Dr. Moress for the examination, and that defendant knew that Dr. Moress would provide a conservative medical opinion and that there was a strong likelihood that his opinion would not be favorable to plaintiff. Plaintiff alleges that defendant's reliance on Dr. Moress' report in terminating benefits was intentional, unjustified, and caused her severe emotional distress.

It is proper and indicative of good faith conduct for an insurer to rely on an expert's opinion in administering a claim or in defending an uncertain claim. The Court of

Appeals has held that an insurer is entitled to rely on an expert's opinion. Callioux v. Progressive Ins. Co., 745 P.2d 838 (Utah App. 1987). Moreover, an insurer is permitted to assert its rights to defend against uncertain claims.

> Undoubtedly an insurance company is privileged, in pursuing its own economic interests, to assert in a permissible way its legal rights and to communicate its position in good faith to its insured even though it is substantially certain that in so doing emotional distress will be caused. (Rest. 2d Torts, section 468 com. G and illus. 14; cf. Rest. Torts, section 773; and see generally Prosser, Law of Torts (3d ed. 1964), 'Privilege,' pp. 99-100.)

Fletcher v. Western National Life Ins. Co., 89 Cal. Rptr. 78 (Cal. App. 1970). Defendant was entitled to assert its legal rights, to defend against uncertain claims and to process the plaintiff's claim for additional medical benefits according to the opinion of its medical expert. Therefor, plaintiff's third cause of action for intentional infliction of severe emotional distress is not viable under these factual allegations, and is legally insufficient. The third cause of action is dismissed with prejudice.

Plaintiff has alleged entitlement to punitive damages. All of plaintiff's claims are in contract. Allegations of a breach of duty of good faith and fair dealing are contractual in nature. Punitive damages are not recoverable under contract claims. Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989). Therefore, plaintiff's claims for punitive damages are dismissed with prejudice.

The fourth cause of action alleges that defendant engaged in a tortious course of conduct by using Dr. Gerald Moress for plaintiff's independent medical examination,

allegedly knowing that his opinions favor the insurance company rather than being "fair, balanced, medically sound and accurate." However, the defendant was entitled by law to select any physician it desired to perform an independent medical examination:

> . . . The defendant may also require the applicant to submit to an independent medical examination to be conducted by a physician of the defendant's choice. Failure of an applicant to comply with such requests may result in the dismissal of a claim or a delay in the scheduling of a hearing.

Utah Admin. Rules, R568-1-4(H), (formerly R490-1-4(H)). The Industrial Commission rule specifically provides that the defendant in a workers' compensation action may choose any physician to perform an examination. Therefore, the plaintiff's cause of action regarding the defendant's selection of a physician to perform an independent medical examination is insufficient as a matter of law, and is dismissed with prejudice.

Plaintiff's fifth cause of action alleges that defendant breached a fiduciary relationship with the plaintiff by failing to provide certain medical treatment when the treatment was requested by plaintiff. For the reasons stated above, plaintiff's fifth cause of action for breach of fiduciary relationship fails, and is dismissed with prejudice.

Plaintiff's sixth cause of action alleges that defendant interfered with plaintiff's protected property interest by denying coverage for certain medical benefits when

requested by the plaintiff. For the reasons stated above, plaintiff's sixth cause of action for interference with a protected property interest fails, and is dismissed with prejudice.

Dated this 14th day of August, 1992.

BY THE COURT

Leslie A. Lewis
District Court Judge

Approved as to form:

John Preston Creer

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

PAT CHRISTINE SAVAGE Plaintiff, vs. EDUCATORS INSURANCE COMPANY, a Utah Corporation, Defendant.	:	**ORDER OF DISMISSAL** Civil No. 920901786 Judge Leslie A. Lewis

Based upon the Findings and Conclusions of Law entered by the Court in this matter, it is hereby ORDERED that the plaintiff's First Amended Complaint be and hereby is DISMISSED in its entirety, WITH PREJUDICE.

Dated this 14th day of August, 1992.

BY THE COURT

Leslie A. Lewis
District Court Judge

Approved as to form:

John Preston Creer

Form 001 Revised 3/91

Industrial Commission of Utah
Industrial Accidents Division
160 East 300 South - P.O. Box 510250
S.L.C., UT 84151-0250
NOTE: PLEASE TYPE OR PRINT IN BLACK INK

The Industrial Commission has the following documents on file
Medical [ ]
Employer Report [ ]
First Payment Report [ ]
Copies of the above documents will be provided upon request

_____ *
Applicant (Employee) *
*
_____ *
Maiden Name and/or Other Name(s) Used *
v. *
_____ *
Employer *
*
_____ *
Employer's Street Address *
*
_____ *
Employer s Insurance Carrier *

APPLICATION FOR HEARING

APPLICANT ALLEGES AND REQUESTS RESOLUTION CONCERNING THE FOLLOWING UNDER TITLE 35:

1. I sustained an injury by accident arising out of and in the course of employment with Defendant (employer) on the _____ day of _____, 19____, at the following location: *(Give name & complete address or nearest junction, mile marker, etc.)* _____
2. The accident occurred as follows: *(Describe accident and resulting injuries (Body part(s) injured)* _____
   _____
3. The injury caused temporary total disability from _____ to _____
   Date first off Date returned
4. I have received compensation as follows: *(Indicate the last paid amounts you received (weekly or monthly) and the last payment date.)* _____
   _____
5. This Claim is filed because: *(Please mark an X in the appropriate space(s))*
   A. ____ Unpaid Medical Expenses
   B. ____ Recommended Medical Care
   C. ____ Temporary Total Compensation
   D. ____ Temporary Partial Compensation
   E. ____ Permanent Partial Compensation
   F. ____ Permanent Total Compensation
   G. ____ Travel Expenses
   H. ____ Interest
   I. ____ Other *(specify)* _____
   _____
6. IN ADDITION, THE CLAIMANT ALLEGES: *(Please fill in or mark appropriate blank)*
   My date of birth is _____. At the time of injury my wage was $ _____ (per hour; day; week; month; or other *(if other, specify method of payment)* and I was working _____ hours per week.
   I ____ was / ____ was not married and had _____ children under age 18 dependent on me for support.

Date _____ _____
Printed Name of Applicant

_____ _____
Printed Name of Attorney Signature of Applicant

_____ _____
Signature of Attorney Street Address of Applicant

_____ _____
Street Address & Office # of Attorney City / State / Zip of Applicant

_____ / _____ _____ / _____
City / State / Zip Telephone Applicant's Telephone Social Security #

UNSIGNED OR INCOMPLETE FORMS WILL BE RETURNED

PART X

WORKERS COMPENSATION INSURANCE CONTRACTS

31A-22-1001. Obligation to write workers compensation insurance.

The Workers' Compensation Fund of Utah shall write all workers' compensation insurance for which application is made to the Workers' Compensation Fund of Utah. This requirement does not apply to any other insurer.

History: C. 1953, 31A-22-1001, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 183.

Cross-References. — Workers' compensation, Chapter 1 of Title 35.

31A-22-1002. Duration of coverage.

(1) Any insurer assuming a workers' compensation risk shall carry it until the policy is canceled, either:

(a) by agreement between the Industrial Commission, the insurer, and the employer; or

(b) after 30 days notice by the insurer to the employer, and after notice to the Industrial Commission as provided in Section 35-1-47.

(2) The provisions of Subsection (1) do not affect the requirements of Section 31A-22-1001.

History: C. 1953, 31A-22-1002, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 184; 1986, ch. 211, § 2; 1986 (2nd S.S.), ch. 2, § 1.

NOTES TO DECISIONS

ANALYSIS

Entitlement to workers' compensation.

—Partner.

An employer was not entitled to workers' compensation as a partner when, in fact, he was not a partner, even though the State Insurance Fund had endorsed his insurance policy by including him as a partner and the fund had not taken either of the two statutory alternatives allowing it to cancel the policy. Commission of Fin. v. Industrial Comm'n, 12 Utah 2d 415, 367 P.2d 455 (1962).

Notice of cancellation.

—Effect of untimeliness.

Notice of cancellation for nonpayment of premium mailed twelve days before the policy was to be canceled according to the notice did not comply with requirement of 30 days' notice and therefore was ineffective for purpose of canceling policy at any time. Employers Mut. Liab. Ins. Co. v. Industrial Comm'n, 20 Utah 2d 192, 436 P.2d 228 (1968).

COLLATERAL REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d Workmen's Compensation § 662.

C.J.S. — 100 C.J.S. Workmen's Compensation § 353(1).

Key Numbers. — Workmen's Compensation ⇐ 1045.

31A-22-1003. Comprehensive coverage.

Every insurance policy covering the liability of an employer under Chapter 1, Title 35, shall cover all types of workers compensation benefits required to be provided under that chapter. This section does not preclude primary and excess coverage being provided under different contracts.

History: C. 1953, 31A-22-1003, enacted by L. 1985, ch. 242, § 27; 1987, ch. 91, § 57.

Amendment Notes. — The 1987 amendment substituted "Title 35" for "title 53."

31A-22-1004. Direct enforcement by employees.

All workers compensation insurance policies shall contain a provision that employees may enforce, in their own names, the liability of the insurer.

History: C. 1953, 31A-22-1004, enacted by L. 1985, ch. 242, § 27.

31A-22-1005. Payment as bar to recovery.

Payment of compensation under a workers compensation insurance policy, whether in whole or in part, by either the employer or the insurer, bars recovery by the employee or his dependents to the extent of the payment.

History: C. 1953, 31A-22-1005, enacted by L. 1985, ch. 242, § 27.

31A-22-1006. Insurer's constructive knowledge.

Every workers compensation policy or contract shall contain a provision that, as between the employee and the insurer, notice to or knowledge of the occurrence of the injury on the part of the employer is considered to be notice or knowledge to the insurer. This provision shall also state that the insurer is bound by and subject to the orders, findings, decisions, and awards rendered against the employer for the payment of compensation on account of compensable accidental injuries or occupational disease disability.

History: C. 1953, 31A-22-1006, enacted by L. 1985, ch. 242, § 27.

31A-22-1007. Employer's insolvency.

Every workers compensation policy or contract shall contain a provision that the insolvency of the employer and his discharge does not relieve the insurer from the payment of compensation for injuries or death sustained by an employee during the life of that policy or contract.

History: C. 1953, 31A-22-1007, enacted by L. 1985, ch. 242, § 27.

31A-22-1008. Employer's breach of safety rules.

No condition in a workers compensation policy requiring the insured employer to comply with certain safety rules may excuse the workers compensation insurer from paying the required benefits to an employee injured as a result of the employer's breach of a safety rule that is a condition to the workers compensation policy. However, the insurer may bring a claim against the insured employer for breach of the policy condition.

History: C. 1953, 31A-22-1008, enacted by L. 1985, ch. 242, § 27.

31A-22-1009. Other applicable provisions.

Workers compensation insurance contracts are subject to any applicable requirements of Chapter 1, Title 35.

History: C. 1953, 31A-22-1009, enacted by L. 1985, ch. 242, § 27.

PART III

OWNER'S OR OPERATOR'S SECURITY REQUIREMENT

41-12a-301. Requirement of owner's or operator's security — Exceptions for off-highway vehicles and off-highway implements of husbandry.

(1) Every resident owner of a motor vehicle shall maintain owner's or operator's security in effect throughout the registration period of the motor vehicle.

(2) Every nonresident owner of a motor vehicle which has been physically present in this state for more than 90 days during the preceding 365 days shall thereafter maintain owner's or operator's security in effect continuously throughout the period the motor vehicle remains within Utah.

(3) The state of Utah and all of its political subdivisions and their respective departments, institutions, or agencies shall maintain owner's or operator's security in effect continuously in respect to their motor vehicles. Any other state is considered to be a nonresident owner of its motor vehicles and is subject to Subsection (2).

(4) The United States or any political subdivision of it, or any of its agencies, may maintain owner's or operator's security in effect in respect to their motor vehicles.

(5) Owner's or operator's security is not required for:

(a) off-highway vehicles registered under Section 41-22-3 when operated either:

(i) on a highway designated as open for off-highway vehicle use; or

(ii) in the manner prescribed by Section 41-22-10.3; or

(b) off-highway implements of husbandry operated in the manner prescribed by Subsections 41-22-5.5(3) through (5).

History: C. 1953, 41-12a-301, enacted by L. 1985, ch. 242, § 48; L. 1987, ch. 162, § 29.

Amendment Notes. — The 1987 amendment added Subsection (5).

NOTES TO DECISIONS

Liability of county.

Liability of county, as self-insurer of own vehicles operated by permissive users, under former law. See Foster v. Salt Lake County, 712 P.2d 224 (Utah 1985).

COLLATERAL REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d Automobile and Highway Traffic § 156 et seq.

C.J.S. — 60 C.J.S. Motor Vehicles § 160; 60A C.J.S. Motor Vehicles § 248.

Key Numbers. — Automobiles ⇐ 144, 147.

41-12a-302. Operating motor vehicle without owner's or operator's security.

Any owner of a motor vehicle on which owner's or operator's security is required under Section 41-12a-301, who operates his vehicle or permits it to be operated on a public highway in this state without owner's security being in effect is guilty of a class B misdemeanor. Any other person who operates the motor vehicle upon a public highway in Utah with the knowledge that the owner does not have owner's security in effect is also guilty of a class B misdemeanor, unless that person has owner's security on a Utah-registered car or its equivalent in effect which covers the operation, by him, of the motor vehicle in question.

History: C. 1953, 41-12a-302, enacted by L. 1985, ch. 242, § 48; L. 1987, ch. 92, § 56.

Amendment Notes. — The 1987 amendment corrected a misspelling.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

41-12a-303. Condition to obtaining registration, license plates, or safety inspection.

The owner of a motor vehicle required to maintain owner's security under Section 41-12a-301 may be required to swear or affirm, in writing, or present other reasonable evidence that he has owner's security in effect at the time of registering, obtaining license plates for, or a safety inspection of the motor vehicle.

History: C. 1953, 41-12a-303, enacted by L. 1985, ch. 242, § 48.

CHAPTER 12a
MOTOR VEHICLE FINANCIAL RESPONSIBILITY

PART I
GENERAL PROVISIONS

41-12a-103. Definitions.

As used in this chapter:

(1) "Department" means the Department of Public Safety.

(2) "Judgment" means any judgment which is final by expiration without appeal of the time within which an appeal might have been perfected, or by final affirmation on appeal, rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance, or use of any motor vehicle, for damages, including damages for care and loss of services, because of bodily injury to or death of any person, or because of injury to or destruction of property including the loss of use thereof, or upon a cause of action on an agreement of settlement for such damages.

(3) "License" or "license certificate" have the same meanings as under Section 41-2-102.

(4) "Motor vehicle" means every self-propelled vehicle which is designed for use upon a highway, including trailers and semitrailers designed for use with such vehicles, except traction engines, road rollers, farm tractors, tractor cranes, power shovels, and well drillers, and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails.

(5) "Nonresident" means every person who is not a resident of Utah.

(6) "Nonresident's operating privilege" means the privilege conferred upon a person who is not a resident of Utah by the laws of Utah pertaining to the operation by him of a motor vehicle, or the use of a motor vehicle owned by him, in Utah.

(7) "Operator" means every person who is in actual physical control of a motor vehicle.

(8) "Owner" means a person who holds legal title to a motor vehicle, is a lessee in possession, or if a motor vehicle is the subject of a conditional sale or lease with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession in the conditional vendee or lessee, or is the subject of a mortgage with the mortgagor entitled to possession, then the conditional vendee, lessee, or mortgagor is considered to be the owner for the purposes of this chapter.

(9) "Owner's or operator's security," "owner's security," or "operator's security" means any of the following:

(a) an insurance policy or combination of policies conforming to Section 31A-22-302 which is issued by an insurer authorized to do business in Utah;

(b) a surety bond issued by an insurer authorized to do a surety business in Utah in which the surety is subject to the minimum coverage limits and other requirements of policies conforming to Section 31A-22-302, which names the department as a creditor under the bond for the use of persons entitled to the proceeds of the bond;

(c) a deposit with the state treasurer of cash or securities complying with Section 41-12a-406;

(d) maintaining a certificate of self-funded coverage under Section 41-12a-407;

(e) a policy conforming to Section 31A-22-302 issued by the Risk Management Fund created in Section 63-1-47.

(10) "Registration" means the issuance of the certificates and registration plates issued under the laws of Utah pertaining to the registration of motor vehicles.

(11) "Self insurance" has the same meaning as provided in Section 31A-1-301.

History: C. 1953, 41-12a-103, enacted by L. 1985, ch. 242, § 48; 1987, ch. 137, § 73; 1991, ch. 203, § 1.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, added Subsections (9)(e) and (11) and made related changes.

NOTES TO DECISIONS

Cited in United States Fid. & Guar. Co. v. United States, 728 F. Supp. 651 (D. Utah 1989).

COLLATERAL REFERENCES

A.L.R. — What constitutes "entering" or "alighting from" vehicle within meaning of insurance policy, or statute mandating insurance coverage, 59 A.L.R.4th 149.

State regulation of motor vehicle rental ("you-drive") business, 60 A.L.R.4th 784.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony;

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(j) appeals from the Utah Military Court; and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22; 1992, ch. 127, § 12.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, added Subsection (2)(h) and redesignated former Subsections (2)(h) through (j) as Subsections (2)(i) through (k).

R490. Industrial Commission, Industrial Accidents.
R490-1. Workers' Compensation Rules - Procedures.
R490-1-1. Definitions.

A. "Commission" - means the Industrial Commission of Utah.

B. "Applicant/Plaintiff" - means an injured employee or his/her dependent(s) or any person seeking relief or claiming benefits under the Workers' Compensation and/or Occupational Disease and Disability Laws.

C. "Defendant" - means an employer, insurance carrier, self-insurer, the Employers' Reinsurance Fund, and/or the Uninsured Employers' Fund.

D. "Administrative Law Judge" - means a person duly designated by the Industrial Commission to hear and determine disputed or other cases under the provisions of Title 35, Chapters 1 and 2, and of Title 63, Chapter 46b, U.C.A.

E. "Insurance Carrier" - includes all insurance companies writing workers' compensation and occupational disease and disability insurance, the Workers' Compensation Fund, and self-insurers who are granted self-insuring privileges by the Industrial Commission. In all cases involving no insurance coverage by the employer, the term "Insurance Carrier" includes the employer.

F. "Medical Panel" - means a panel appointed by the Commission pursuant to the standards set forth in Sections 35-1-77 and 35-2-56, U.C.A., which is responsible to make findings regarding disputed medical aspects of a compensation claim, and may make any additional findings, perform any tests, or make any inquiry as the Commission may require.

G. "Award" - means the finding or decision of the Commission or Administrative Law Judge as to the amount of compensation or benefits due any injured employee or the dependent(s) of a deceased employee.

R490-1-2. **Authority.**

This rule is being enacted under the authority of Sections 35-1-10 and 35-2-5, U.C.A.

R490-1-3. Official Forms.

A. "Employer's First Report of Injury - Form 122" - This form is used for reporting accidents, injuries, or occupational diseases as per Section 35-1-97, U.C.A. This form must be filed within seven days of the occurrence of the alleged industrial accident or the employer's first knowledge or notification of the same. This form also serves as OSHA Form 101.

B. "Physician's Initial Report of Work Injury or Occupational Disease - Form 123" - This form is used by all medical practitioners to report their initial treatment of an injured employee.

C. "Chiropractor's Supplemental Report - Form 124" - This form is to be filed with the insurance carrier or self-insurer after each 15 treatments administered by the chiropractic physician.

D. "Statement of Insurance Carrier or Self-Insurer with Respect to Payment of Benefits - Form 141" - This form is used for reporting the initial benefits paid to an injured employee. This form must be filed with or mailed to the Industrial Commission on the same date the first payment of compensation is mailed to the employee. A copy of this form must accompany the first payment.

E. "Statement of Insurance Carrier or Self-Insurer with Respect to Discontinuance of Benefits - Form 142" - This form is to be used by insurance carriers or self-insured employers to notify an employee of the discontinuance of weekly compensation benefits. The form must be mailed to the employee and

filed with the Commission five days before the date compensation stops for any reason.

F. "Application for Hearing - Form 001" - Used by an applicant for instituting an industrial claim against an insurance carrier, self-insured employer, or uninsured employer. This form, obtainable from the Industrial Commission, must be filed and signed by the injured employee or his/her agent. All blanks must be completed to the best knowledge, belief, or information of the injured employee.

G. "Claim for Protection of Rights - Form 002" - Used by an injured employee for the sole purpose of protecting his/her rights even though a dispute does not exist. Copies are forwarded to all parties concerned. NOTE: THIS FORM DOES NOT NEED TO BE FILED WHEN ANY OTHER APPLICATION HAS BEEN FILED.

H. Claim for Dependents' Benefits and/or Burial Benefits - Form 025" - This form is used by the dependent(s) of a deceased employee to seek benefits as a result of a fatal accident occurring in the course of employment.

1. This form must be filed before a hearing or an award is made, and pleadings will not be accepted in lieu thereof. If pleadings are submitted, the attorney so filing will be supplied the form for filing before any proceedings are initiated.

2. The filing of this form by the surviving spouse on behalf of the surviving spouse and the surviving spouse's dependent minor children is sufficient for all dependents.

3. Unless otherwise directed by an Administrative Law Judge, the following information shall be supplied before an Order or an Award is made:

(a) A certified copy of the marriage license and birth certificates of dependent minor children. If such evidence is not readily available, the Commission will determine the adequacy of substitute evidence.

(b) Adoption papers or other decrees of courts of record establishing legal responsibility for support of dependent children.

(c) If either the deceased employee or surviving spouse has been involved in divorce proceedings, copies of decrees and orders of the court should be supplied.

I. "Occupational Disease Claim of Employee - Form 026" - This form is used by an employee claiming benefits under the Occupational Disease Disability Act.

J. "Occupational Disease Claim of Dependent - Form 027" - This form is used by the dependent(s) of a deceased employee who died as a result of an occupational disease. All provisions of Section G above apply equally to this form.

K. "Insurance Company's and Self-Insurer's Final Report of Injury and Statement of Total Losses - Form 130" - This form is used by insurance carriers and self-insurers to report the total losses occurring in a claim for any benefits. This form must be filed as soon as final settlement is made but in no event more than 30 days from such settlement. This form shall be filed for all losses including medical only, compensation, survivor benefits, or any combination of all so as to provide complete loss information for each claim.

L. "Dependents' Benefit Order - Form 151" - This form is used by the Commission in all accidental death cases where no issue of liability for the death or establishment of dependency is raised and only one household of dependents is involved. The carrier indicates acceptance of liability by completing the top half of the form and filing it with the Commission.

M. "Medical Information Authorization - Form 046" - This form is used